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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CHARLES ELMER, et al., Plaintiffs and Appellants, v. WILLIAM MOORES, et al. Defendants and Respondents.	A123496 (Mendocino County Super. Ct. No. 06-96648)

Appellants Charles Elmer and Josephine Elmer (the Elmers) appeal from the trial court's partial grant of the motion by respondents William Moores and the Irish Beach Architectural Committee (IBAC) for a new trial of two of the three causes of action in respondents' cross-complaint, after the court initially granted the Elmers' motion for summary adjudication. The Elmers argue that the trial court committed legal error when it found, contrary to its initial ruling, that respondents' first two causes of action were not time-barred by the five-year limitations period provided for in Code of Civil Procedure section 336, subdivision (b). We agree with the Elmers, reverse the trial court's order, and remand for entry of judgment in the Elmers' favor.

BACKGROUND

In March 2006, the Elmers sued respondents for declaratory and injunctive relief. Respondents cross-complained against the Elmers, which cross-complaint is the subject of this appeal.

The Years of Previous Litigation

The Elmers own real property located in Mendocino County, commonly known as 42230 Alta Mesa Road in Manchester, California (property), which they purchased in 2000 from Sharon Ross. Ross had obtained title to the property from Kristine Martin (Kristine), who had held legal title since she obtained it from respondent Moores in 1987. Respondents contended in their cross-complaint that David Martin (Martin), Kristine's father, was a putative owner of the property. Ross, Kristine, and Martin are not parties to this action.

The property is subject to certain covenants, conditions, and restrictions (CC&Rs) regarding its development that are contained in a declaration of restrictions, and which were at the center of years of litigation between respondents and the property owners who preceded the Elmers. In 1992, respondents obtained a judgment against Martin declaring that the CC&Rs governed the property and ordering Martin to remove unapproved outbuildings and comply with the CC&Rs. The court issued further orders in 1997, but disputes continued.

Martin and respondents entered into a 1999 stipulated judgment which provided that Martin would apply to a newly established architectural committee for approval of an existing roadway and two outbuildings located on the property, with the court retaining jurisdiction over the matter. The architectural committee would consist of Moores, Martin, Gordon Moores, and two members of the Irish Beach Improvement Club, a committee formed by owners of property previously subject to the CC&Rs. Moores subsequently asserted that Martin did not secure the architectural committee's approval for a driveway and certain outbuildings on the property.

In June 2001, Ross, as Martin's successor-in-interest, and respondents, stipulated to the consolidation of their lawsuits, which led to a bench trial and 2003 judgment. The 2003 judgment referred to the plaintiff as "David Martin and his successor-in-interest Sharon Ross." The court found, among other things, that the CC&Rs governed the property and, based on Martin's violation of the 1999 stipulated judgment, ordered "plaintiff" to pay $73,700 in penalties. Plaintiff was ordered "to remove or secure IBIC

approval"[1] for certain outbuildings existing on the property and to remove any outbuilding not approved by the committee, and would be liable for monetary penalties to the committee if it failed to remove prohibited outbuildings. The court found that plaintiff violated the 1999 stipulated judgment by not applying for architectural committee approval of new road improvements and ordered plaintiff to do so, as well as to apply for approval of any proposed change in the location of deeded easements.

The Elmers' Allegations

The Elmers allege in their complaint that they sought to obtain committee approvals, but respondents imposed a series of new conditions not contained in the 2003 judgment, including Moores's demand of $28,000 for approval of the existing roadway. Respondents also told the Elmers that they were liable for the $73,700 in penalties imposed by the 2003 judgment, which were continuing to accrue, and that their applications did not comply with the 2003 judgment.

The Elmers further alleged that in 2006, IBAC threatened to enter their property and remove the roadway that crossed the property, their driveway, and housing for a pump that brought water to their residence, and also threatened to destroy certain vegetation and landscaping in order to install a new roadway. The Elmers sought injunctive and declaratory relief against respondents, including to prevent them from entering their property other than for emergencies or to access other properties, and to establish that the Elmers were not liable for the monetary penalties assessed in the 2003 judgment.

Respondents' Allegations

In their cross-complaint, Moores and the IBAC alleged they were each authorized to enforce the CC&Rs contained in the declaration of restrictions. They brought three causes of action against the Elmers. They sought declaratory relief in their first cause of action. Specifically, they asked for a judicial determination that the declaration of restrictions "prohibits all work of improvement, including access roads, on the [property]

[1] Given the context, it appears that the court intended to refer to the IBAC.

without the approval of the IBAC"; certain roadways had been constructed and maintained without IBAC approval; certain "remnants of outbuildings" and an unauthorized pump house, needed to be removed; and roadways needed to be restored to their prior conditions. They also sought a judicial determination the Elmers were personally liable for all monetary damages awarded against Ross and Martin in the 2003 judgment.

In their second cause of action, respondents sought a preliminary and permanent injunction ordering the Elmers to remove the disputed roadways and restore the areas occupied by them to their prior conditions, and remove the remnants of outbuildings and the pump house that were not approved by the IBAC.

In their third cause of action, respondents pled breach of contract. They contended the Elmers had agreed via a settlement agreement with Ross to assume her liability for all sums owing under the 2003 judgment, respondents had accepted Ross's assignment of that agreement to them, and that the Elmers refused to pay respondents what they were owed as assignees.

The Motion for Summary Judgment and/or Summary Adjudication

The Elmers moved for summary judgment and/or summary adjudication regarding respondents' cross-complaint. Regarding respondents' first two causes of action, the Elmers argued the five-year limitations period stated in Code of Civil Procedure section 336, subdivision (b)[2] barred these claims. The Elmers based this argument on the undisputed facts that respondents had discovered the purported CC&R violations in 1996 and demanded that Ross correct them in August 2000; the Elmers acquired title to the property in September 2000 and were notified by respondents' counsel in December 2000 about the alleged CC&R violations; and respondents did not sue the Elmers until July 2006.

[2] All statutory references herein are to the Code of Civil Procedure.

The trial court granted the Elmers' motion for summary adjudication, finding that the first two causes of action were time-barred by section 336, subdivision (b). The court stated in its order:

"[Section 336, subdivision (b)] provides that an action under Civil Code [section] 784 for violation of a restriction on the use of real property contained in a declaration of restrictions is barred unless brought within five years of discovery of the violation. According to the Law Revision Commission Comment, section 336 [, subdivision] (b) makes 'clear that the statutory limitation period applicable to enforcement of a restriction is five years, consistent with the general statutes governing recovery of real property.'

"The second and third causes of action in the cross-complaint[3] are causes of action under Civil Code [section] 784 for violation of such restrictions . . . not causes of action for nuisance as [respondents] contend. Undisputed Facts 34 through 40 establish that [respondents] discovered the presently alleged violations of the CC&Rs on the property prior to August 7, 1996, knew by December 11, 2000, that the [Elmers] had become the owners of the property, and first filed litigation against the [Elmers] for the CC&R violations on July 28, 2006.

"I conclude that the undisputed facts establish that the first and second causes of action are barred by section 336, [subdivision] (b)." (Underscore omitted.)

The parties entered into a stipulation for entry of a final judgment in the action, subject to the Elmers being able to reinstate certain dismissed causes of action if the judgment is reversed on appeal.

Respondents' Motion for a New Trial

Respondents subsequently moved for a new trial. They argued that their first two causes of action were timely brought because they were subject to a limitations period that started to run with the issuance of the 2003 judgment, and were in effect claims to abate continuing nuisances, for which violations, with new limitations periods, continued to occur over time.

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[3] It is apparent that the court meant the first and second causes of action here.

The court partially granted respondents' motion for a new trial in a September 24, 2008 order, reversing itself regarding the first two causes of action. It found that, although section 336, subdivision (b) generally imposes a five-year period for bringing such claims, respondents' claims were *not* time-barred, as follows:

"The period prescribed in [section 336, subdivision (b)] runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. ***A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable . . . .***"

The court concluded that it was "wrong in law" when it previously ruled that the first two causes of action were time-barred because "[t]he portions of the [s]tatute emphasized above make it clear that the Legislature enacted [s]ection 336, subdivision (b) only to establish a five-year statute of limitations, and not also to create a prescriptive period throughout which violation of a restriction would ripen into a right to continue to violate it." The court concluded these causes of action were not time-barred regarding any violation of the CC&Rs "committed or maintained on the subject property" within five years of respondents' filing of their cross-complaint in July 2006. It denied the motion as to the third cause of action.

The court rejected respondents' argument that the 2003 judgment bound the Elmers. It did not directly address respondents' contention that their claims should be construed as alleging continuing nuisances.

The Elmers filed a timely notice of appeal from the court's September 24 order. The court subsequently filed an October 29, 2008 order, which incorporated the September 24 order and vacated the stipulated judgment.

DISCUSSION

I. *Standard of Review*

Section 657 sets out the grounds for a motion for a new trial, which include an error in law. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633; § 657.) " 'On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons . . . ,' " with two exceptions (*Oakland Raiders,* at pp. 634-636, quoting § 657), neither of which applies to the arguments made here.

Whether an error of law occurred in the granting of a summary judgment, and whether a subsequent order granting a new trial was, therefore, proper, are issues reviewed under an independent standard of review. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859-860.) " '[I]f it appears on appeal that a trial court in granting a new trial based its order exclusively upon an erroneous concept of legal principles applicable to the cause, its order will be reversed.' " (*Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1008-1009.)

II. *The Elmer's Procedural Defect Claims*

The Elmers first argue that the trial court's order partially granting respondents' motion for a new trial was defective because the September 24 and October 29 orders did not adequately state the grounds for the ruling. Respondents disagree, asserting that the trial court's September 24 order sufficiently stated grounds and the October 29 order is not relevant. Respondents are correct.

An order granting a motion for a new trial adequately states supporting grounds if the trial court's intention is clear. (*Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 709-710 (*Jones*); § 657.) A statement of grounds that reasonably approximates the statutory language is sufficient. (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 640.)

In *Jones*, *supra*, 8 Cal.3d 706, the plaintiffs moved for a new trial on several grounds, including because the evidence was insufficient to justify the defense verdict. (*Id*. at p. 708.) The trial court granted the motion, concluding that the jury was misled

into engaging in speculation. (*Ibid*.) The defendant argued that the trial court's order did not sufficiently specify the ground for a new trial. Our Supreme Court disagreed, holding that "[i]nclusion of statutory language in the order, although preferable, is not invariably required; the ground for new trial is adequately specified if the intention of the court is clear." (*Id.* at pp. 709-710.) Furthermore, the court observed, "[i]t is difficult to conceive of a court specifying a reason without simultaneously revealing an intention as to the ground. Because a reason must be directed to explaining and supporting a particular ground [citation], it would seem that the reason necessarily reflects that ground." (*Id*. at p. 710.)

The Elmers contend that the court's September 24 order identified the reasons for its ruling, but not its grounds. We disagree. Similar to the court's statements in the order under review in *Jones*, the trial court's statements in the September 24 order made clear the grounds for its ruling. After referring to section 336, subdivision (b) and highlighting the statutory language it was relying on, the court stated that it "went wrong in the law." It also stated that section 336, subdivision (b) does not create "a prescriptive period throughout which violation of a restriction would ripen into a right to continue to violate it." These statements indicate the court was granting a new trial because of an "error in law," one of the statutory grounds for granting a motion for a new trial. (§ 657, subd. (7).) Therefore, the Elmers' claim that this order was insufficient lacks merit.

We do not need to consider the parties' arguments regarding the October 29 order because, as respondents point out, the Elmers appealed from the September 24 order only.

III. *Statute of Limitations*

The Elmers next argue that the trial court made an error of law because the five-year limitations period stated in section 336, subdivision (b) barred respondents' first two causes of action. Respondents disagree for the reasons we summarize below. Based on the nature of the violations alleged by respondents and the plain language of section 336, subdivision (b), we conclude that the Elmers are correct.

The parties agree that section 336, subdivision (b) applies to respondents' claims of CC&R violations.[4] It provides that a party has five years to bring an action for such a violation. (§ 336, subd. (b).) This period "runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for violation of a restriction before January 1, 2001, and until January 1, 2001, any other applicable statutory or common law limitation shall continue to apply to that action." (§ 336, subd. (b).)

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' " (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) The discovery rule, which is expressly incorporated into section 336, subdivision (b), "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

The parties debate when the five-year limitation period accrued for the violations alleged by respondents. The Elmers argue that section 336, subdivision (b) required respondents to have filed suit by December 11, 2005, because respondents had indisputably discovered all the purported violations by December 2000, when their counsel wrote to the Elmers. According to the Elmers, contrary to the trial court's reasoning in its September 24 order partially granting the motion for a new trial, section 336, subdivision (b)'s five-year limitations period was not extended by its "no waiver"

[4] Section 336, subdivision (b) applies to actions alleging violations of a "restriction" as defined in section 784, which in turn defines a "restriction" as "a limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction."

clause simply because the violations continued to exist during the five-year period. They offer as an illustration the hypothetical homeowner who paints his house purple without obtaining the required prior approval of a homeowner's association. Under section 336, subdivision (b), the association would have five years after discovering the purple paint job to bring an action against the homeowner. After the five years, the association could do nothing about the purple house. However, it could enforce the restriction if another homeowner painted his or her house without prior approval or if the purple house owner sought to paint the house another color.

Respondents disagree. They argue that their first two causes of action in effect sought the abatement of "continuing nuisances" that could have been abated at any time. Therefore, they reason, separate causes of action arose every day for as long as the violations continued, even if an action based on the original wrong might be barred. Citing case law regarding continuing nuisances and language in the CC&Rs, they claim the trial court ruled correctly in the September 24 order based on the plain language of section 336, subdivision (b). They also argue that at the very least, the issue of whether the violations were continuing should have been left for a jury to determine.

The Elmers reply that respondents could not maintain a "continuing nuisance" argument in a summary judgment context because they did not plead such facts in their cross-complaint, and that section 336, subdivision (b) was not intended to create a "continuing violation" exception akin to continuing nuisance.

We conclude that the Elmers are correct. Respondents' failure to plead continuing nuisance is fatal to their argument. Furthermore, the trial court's partial grant of respondents' motion for a new trial was based on the mistaken view that the continued existence of the alleged violations somehow made them "continuing nuisances" or "continuing violations," and an overly broad reading of section 336, subdivision (b).

A. *Respondents Did Not Allege "Continuing Nuisances"*

Respondents argue that, however their claims were labeled, we should construe their claims as seeking abatement of "continuing nuisances." We agree with the Elmers that this is incorrect.

Respondents contend the trial court's summary judgment ruling that the first two causes of action were time-barred disregarded "the express language and import of the [CC&Rs] at issue which provide that violations thereof constitute a nuisance." They point to section 7.01 of the CC&Rs, which states: "Every act or omission whereby any limitation, restriction, easement, charge or covenant of these Restrictions is violated in whole or in part is hereby declared to be and to constitute a nuisance and may be enjoined or abated, whether the relief sought is for negative or affirmative action."

According to respondents, "by contract, the parties hereto agreed that any violation of the [CC&Rs] is deemed to be a nuisance, and that the law of nuisance applies to this case." Respondents further assert that, since "[t]he evidence establishes that each of these nuisances could have been easily abated," they amount to "continuing nuisance[s]," with each repetition of the nuisances starting a new limitations period; therefore, section 336, subdivision (b)'s limitations period has not yet run on any of them.

As we have already discussed, section 657 provides that our scope of review is not limited to the grounds identified by the trial court's order, since we are to affirm the order "if it should have been granted upon any ground stated in the motion, whether or not specified in the order, or specification of reasons." (§ 657.) Respondents argued below that the Elmers' purported violations of the CC&Rs constituted "continuing nuisances" that were not time-barred. Therefore, we consider the merits of this argument.

Respondents' argument ignores that they did not raise their nuisance claims in the one place where they were required to do so: in their pleadings. The pleadings " 'delimit the scope of the issues' " and " 'the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.' " (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) The complaint "measures the materiality of the facts tendered in defendant's challenge to plaintiff's cause of action." (*Ibid*.) Thus, defendants moving for summary judgment " 'need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' " (*Gresher v. Anderson* (2005) 127

Cal.App.4th 88, 103, quoting *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, fn. 4.)

Respondents argue that the label attached to causes of action does not control how they should be construed, citing the statement in *Cochran v. Cochran* (1998) 65 Cal.App.4th 488 that, when considering demurrers, "we must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory." (*Id*. at p. 493.) The Elmers similarly point out that "the applicable statute of limitations is not determined by plaintiff's characterization of its cause of action. Instead, it is determined by the facts alleged in the complaint and proven[.]" (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1189.) Having examined respondents' allegations in their first two causes of action, we find no reason to construe them as alleging continuing nuisances, and respondents provide no reason why we should. They make no reference to section 7.01 of the CC&Rs, do not refer to nuisances, and do not contend the violations are of a repeating nature. Rather, they emphasize that the improvements occurred without approval from the IBAC, which indicates that the violations occurred at a precise time in the past and, therefore, were of a permanent nature. The trial court was right to reject this "continuing nuisances" argument when it granted summary adjudication because it was not pled and proven. It is not any basis for granting a motion for a new trial.

B. *The Violations Alleged Are Not "Continuing" in Nature*

The record also indicates that respondents, in their first two causes of action, sought relief for alleged wrongs committed at a discrete point in time in the past: they asserted that certain improvements were violations of the CC&Rs *because they were undertaken without the prior approval of the IBAC*. Therefore, the violations alleged were not "continuing in nature."

Respondents' allegations that prior approval by the IBAC was necessary in all instances were based on the CC&Rs contained in the declaration of restrictions. Respondents repeatedly alleged in their first two causes of action that the "DECLARATION OF RESTRICTIONS prohibits all work of improvement, including

access roads, on the [property], without the approval of the IBAC," that such approvals were not obtained and that, as a result, all improvements must be removed and previous road conditions restored.[5]

Our research indicates that the alleged violations center on the failure to obtain the required IBAC approval before proceeding with the improvements, there was no real opportunity for "abatement"; that would require the Elmers to go back in time to obtain the prior approval not originally sought. (See *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1227 [finding the limitations period for a violation of a covenant to convey parking spaces began running when performance did not occur at the particular time called for in the covenant, and not later, when performance was demanded]; *Bookout v. State of California ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1490 [finding that the alleged nuisance, a solid structure that encroached on the plaintiff's land and produced "continuous damage," was nonetheless " 'unquestionably permanent' "]; *Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 678 [noting that, "[r]egardless of literal abatability, where as a *practical* matter . . . abatement . . . would be inappropriate or unfair then the nuisance may be regarded as permanent"].)

Respondents' argument that abatement was possible was based on a declaration by Moores submitted to the trial court in opposition to the Elmers' motion. Moores stated that the violations could be abated by "submission of the proper application, payment of an application fee, obtaining a permit for the building that complies with the [CC&Rs], and then modifying the building, if necessary." This, however, is another way of asserting respondents' rights under the CC&Rs to insist on prior approval of improvements, regardless of whether the IBAC decides for its own purposes to

[5] The CC&Rs submitted in the course of the parties briefing on the Elmers' motion for summary judgment confirm this prior approval requirement. Paragraph 3.03, subparagraphs (a) through (c) of the CC&Rs set forth the procedure for prior approval, compliance, and review by the IBAC of property improvements. The CC&Rs do *not* provide for any postconstruction approval, instead, stating that the "[IBAC] may remove any work done . . . or maintained in violation of this subparagraph . . . ."

subsequently approve unauthorized modifications. While it may be that the IBAC would give such approval, nothing in the agreement *requires* it to do so.

Respondents cite cases involving continuing nuisances, such as *Phillips v. City of Pasadena* (1945) 27 Cal.2d 104. There, it was alleged that the City of Pasadena placed a locked gate on a public road leading to the plaintiff's business. (*Id*. at pp. 105-106.) The plaintiff sued for damages, which suit the trial court dismissed via demurrer because the action was not timely filed. (*Ibid*.) Our Supreme Court reversed because the nuisance was continuing in nature, since it appeared from the allegations that the locked gate could be removed at any time, rendering every repetition of the continuing nuisance "a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred." (*Id*. at pp. 107-108.)

Respondent does not explain how *Phillips* is relevant here, in the absence of evidence that the alleged violations could be abated. As is also stated in *Philips***,** "[w]here a nuisance is of such a character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance is created." (*Phillips v. City of Pasadena*, *supra*, 27 Cal.2d at p. 107.)

Both parties rely significantly on *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379 (*Cutujian*) for their positions, a case decided shortly before the 1998 enactment of section 336, subdivision (b). (Stats. 1998, ch. 14, § 3.) We conclude the case is not particularly helpful to either side's argument.

In *Cutujian*, a property owner sued the common interest developer, the defendant association, for failing to repair surface slump on his property, alleging breach of covenant and continuing nuisance. (*Cutujian*, *supra*, 41 Cal.App.4th at pp. 1381-1382.) The trial court found that the action was barred by the relevant statute of limitations. (*Id*. at p. 1383.) The appellate court reversed. The court determined, in the absence of any binding authority, that the subject CC&Rs imposed an affirmative duty on the association to maintain the slope areas in a neat and safe condition, and included the obligation to repair and replace improvements when necessary or appropriate. (*Id*. at p. 1387.) The

court concluded that "the most reasonable rule of law" was that the statute commenced when a demand for performance under this obligation was made, making the lawsuit timely. (*Ibid*.)

The Elmers argue that *Cutujian* supports their position because the *Cutujian* court rejected the plaintiff's theory that the purported violation was continuing in nature as long as the association failed to perform, thereby causing a new cause of action to arise each day. (*Cutujian*, *supra*, 41 Cal.App.4th at pp. 1385-1386.) However, *Cutujian*'s reasoning was based on the equities involved with determining the limitations period to enforce a covenant that imposed an *affirmative* duty on the association to maintain the slope. (*Id*. at pp. 1385-1388.) The Elmers are not alleged to have an affirmative duty in the present case, however. Therefore, *Cutujian* is of very little relevance to the Elmers' circumstances.

On the other hand, respondents rely on *Cutujian*, as well as case law from other jurisdictions, to argue that the Elmers' violations gave rise to a new cause of action each day as "continuing nuisances." This argument also fails, for three reasons.

First, although it is true that *Cutujian* recognized that Cutujian's claims had also been timely brought as "continuing nuisance" claims (*Cutujian, supra*, 41 Cal.App.4th at p. 1389), again, it was critical that the CC&Rs involved imposed an *affirmative* duty on the association. As another appellate court recently explained, "*Cutujian* involved performance of a CC&R's covenant not tied to a precise time. . . . Instead of being linked to any particular time, the 'necessary or appropriate' language made the obligation open-ended." (*Crestmar Owners Assn. v. Stapakis, supra*, 157 Cal.App.4th at p. 1227.) By contrast, the alleged violations of the CC&Rs in the present case are "tied to a precise time," in that they allege that IBAC approval was necessary prior to the commencement of any work of improvement.[6]

[6] Similarly, affirmative obligations were involved in the cases respondents cite from other jurisdictions. (*Stalis v. Sugar Creek Stores, Inc.* (2002) 295 A.D.2d 939 [continuing obligation to provide code compliance for septic system]; *1050 Tenants Corp. v. Lapidus* (2001) 289 A.D.2d 145 [continuing use of air conditioning unit that

Second, and related to this first point, the *Cutujian* court noted that the association could abate its violations, given their nature. (*Cutujian, supra,* 41 Cal.App.4th at p. 1389.) As we have already discussed, abatement was not possible here.

Third, Cutujian actually alleged continuing nuisance claims in amended pleadings. (*Cutujian, supra,* 41 Cal.App.4th at pp. 1382-1383.) In sharp contrast, none of respondents' cross-complaint claims were for continuing nuisances, as we have already discussed.

Respondents also summarily argue that if the court were unable to conclude that the violations were continuing in nature, it was a question of fact that properly submitted to a jury. Respondents, however, fail to elaborate further on this argument, which we find unpersuasive in light of our own conclusions.

In short, we conclude that the first and second causes of action alleged violations that were not continuing in nature, such that a new cause of action arose each day that the violations continued to be in existence

C. *Respondent's Claims Were Time-Barred Pursuant to Section 336, Subdivision (b)*

The trial court's interpretation of section 336, subdivision (b) cannot be maintained in light of the alleged violations. " ' "When interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . ' " ' ' "giving them their usual and ordinary meaning and construing them in context. [Citation.] If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. [Citations.] If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said,

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interfered with other lessee rights construed as a continuous or recurring wrong]; *Lake St. Louis Com. v. Oak Bluff Preserve* (1997) 956 S.W.2d 305 [continuing duty to maintain a marina]; *State ex rel. DOT v. Central Telephone* (1991) 822 P.2d 1108 [continuing duty to maintain an underground conduit in good and safe condition]; *Singer Co. v. BG&E Co.* (1989) 558 A.2d 419 [continuing duty to supply electrical power]; *Barker v. Jeremiasen* (1984) 676 P.2d 1259 [continuing duty to refrain from noxious or offensive activities raising horses that may disturb the neighborhood]; *Indian Territory Illuminating Oil Co. v. Rosamond* (1941) 120 P.2d 349 [continuing obligation to protect the land from drainage from adjoining wells].)

and the plain meaning of the statute governs." [Citation.]' [Citation.] This is so ' " ' "whatever may be thought of the wisdom, expediency, or policy of the act." ' " ' " (*Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557, 1564.)

The court's determination that respondents' claims were not time-barred by section 336, subdivision (b) was based on its reading of the second part of the subdivision, which provides that "[a] failure to commence an action for violation of a restriction . . . does not waive the right to commence an action for any other violation of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. . . ." This language has a plain, obvious meaning: the failure to timely pursue a single violation of a restriction does not prevent a party from pursuing another violation of the same restriction, nor create the implication that the restriction has been abandoned, etc. While we have no need to, and do not, decide the question, we note that this clause arguably might save a claim regarding a continuing violation, in which recurring violations repeatedly accrue and are subject to new, separate limitations periods. However, as we have already discussed, the violations here were not "continuing" in nature.

The trial court opined that the Legislature only intended to create a five-year statute of limitations and not a longer prescriptive period. This appears to be the case, but is beside the point. Nothing in section 336, subdivision (b) prevents respondents from pursuing the Elmers for *other* violations of these same provisions. However, once the time runs on the right to challenge a particular violation of the nature alleged here, the right to challenge it is barred. The court's conclusion that section 336, subdivision (b) did not create a prescriptive right to violate a restriction is based on section 336, subdivision (b)'s plain mandate that the *restriction* is not abandoned by a failure to pursue a particular violation, but it does not alter that a particular violation cannot be challenged after the expiration of the five-year limitations period. Otherwise, the limitations period would be meaningless. The court's reading of section 336, subdivision (b) is too broad. Therefore, the court's partial grant of respondents' motion for a new trial must be reversed, and judgment entered in favor of the Elmers.

In light of our conclusion that respondents' first and second causes of action were time-barred pursuant to the plain language of section 336, subdivision (b), we do not address the parties' other interpretation arguments.

IV. *The 2003 Judgment*

Respondents also argue that they were entitled to a new trial because they timely brought the first two causes of action in 2006, based on their theory that section 336, subdivision (b)'s five-year limitations period began to run only upon the entry of the 2003 judgment. Respondents argue that, because they were seeking to enforce covenants and restrictions that ran with the land, they had no obligation to join the Elmers as defendants to this prior litigation against Martin and Ross in order to timely preserve their right to enforce that 2003 judgment against the Elmers. The Elmers argue respondents are barred from raising this claim based on the collateral estoppel doctrine.
We agree with the Elmers.

In its September 24 order partially granting respondents' motion for a new trial, the trial court rejected respondents' argument that the 2003 judgment somehow bound the Elmers. The court found the Elmers "were not joined in that litigation even though they were owners of the subject property for more than two years before [respondents] obtained the 2003 judgment, and they were not subsequent purchasers. On May 2, 2006, Hon. Richard J. Henderson ruled that [the Elmers] are not bound by the judgment and a redetermination of the issue is foreclosed."

The parties agree that, despite the trial court's rejection of respondents' "2003 judgment" argument in ruling on respondents' motion for a new trial, respondents nonetheless are entitled to raise this argument again on appeal. They are correct because, as we have already indicated, we are to affirm the order "if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons." (§ 657.) Therefore, we discuss its merits.

According to respondents, the collateral estoppel effect of the 2006 order related to the monetary penalties contained in the 2003 judgment only. Therefore, respondents

claim, they are free to argue the relevance of the 2003 judgment to their time to bring their claims against the Elmers. We disagree.

A. *The 2003 and 2006 Rulings*

In the 2003 judgment, the court stated that it was ruling upon the claims of the parties for declaratory relief and damages relating to four previously existing judgments or orders of the court related to the property. It identified the plaintiff as Martin and his successor-in-interest, Ross. The court issued a lengthy list of rulings, finding, among other things, that the property was subject to the CC&Rs, and that Martin had failed to make substantial effort to submit an application regarding outbuildings and structures in compliance with the 1999 stipulated judgment, thereby subjecting plaintiff to monetary penalties. The court ordered "plaintiff" to remove or secure committee approval "for all outbuildings existing on the property" except for those depicted in a 1999 application by Martin; and ordered plaintiff to be liable for penalties of $100 a day "for each day that any unapproved outbuilding or portion thereof remains on plaintiff's property," except when an appropriate application was pending. The court also found that plaintiff had failed to comply with previous requirements to apply for approval of the new road improvements, and ordered plaintiff to submit an application for these as well. There was no obligation that any applications be approved.

In 2006, IBAC moved to enforce the 2003 judgment against the Elmers. In doing so, it sought an order finding that the Elmers were liable for monetary penalties. Significantly, it also sought an order finding that the Elmers were not in compliance with the terms of the 2003 judgment regarding the application for approval or removal of certain outbuildings and a pump house on the property, making the Elmers liable for still-accruing postjudgment damages. Thus, the motion argued the application of the 2003 judgment's orders about the property to the Elmers as well.

In its 2006 order, the court stated that the "IBAC . . . brings this motion to enforce the provisions of the implementing judgment against" the Elmers. The court then discussed the prejudgment and postjudgment penalties imposed under the 2003 judgment. The court stated in relevant part regarding prejudgment penalties:

"The Elmers were not parties to either the 1999 or [2003] judgment. . . . The doctrine of *res judicata* does not apply; the Elmers had no obligations under the 1999 judgment so there can be no identity of issues. In the context of the implementing judgment, the court did not determine the parties' rights with respect to the deed restrictions. It simply determined the degree of performance of the parties with obligations contained in the prior judgments and imposed conditions for complying with those judgments. The cited language of the deed restrictions (CCR Sec. 1.06) does not transform the personal judgment against Martin to an obligation running with the land."

Regarding postjudgment penalties, the court stated in relevant part: "The Elmers were not parties to either of the underlying matters. They cannot be bound by the 2003 judgment as successors in interest by title (CCP 1908); they did not take title subsequent to and with knowledge of that judgment but actually acquired title *prior* to that judgment."

The court then stated that "[t]he motion of [IBAC] to impose monetary sanctions on [the Elmers] is denied."

Thus, in 2006, the court found without qualification that the Elmers were not bound by the 2003 judgment and, furthermore, that the court had not determined in that judgment the parties' rights regarding the restrictions, deciding only the application of previous judgments and orders.

B. *Analysis*

The Elmers argue that the trial court correctly determined that the 2006 order bars respondents from relitigating whether the 2003 judgment applies to them. We agree. As the Elmers point out, in order to establish collateral estoppel, a party must establish that the issue presented in the prior adjudication is identical to the issue presented in the present action; there was a final judgment on the merits in the prior action; and the party against whom the doctrine is asserted was a party or was in privity with a party in the prior action. (*Swaffield v. Universal Esco Corp.* (1969) 271 Cal.App.2d 147, 158; *Smith v. ExxonMobil Oil Corp*. (2007) 153 Cal.App.4th 1407, 1414.) " 'Collateral estoppel . . . involves a second action between the same parties on a different cause of action. The

first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action.' " (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867.)

As to the identity of issues, the remedies sought are not determinative because the relevant question is whether the second action is based on the same right or obligation as the first. "If the second suit is based upon the same right or obligation as the first, the cause of action is the same even though different or additional relief is sought." (*Stafford v. Yerge* (1954) 129 Cal.App.2d 165, 171; *Carroll v. Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 487.) " ' " ' 'An erroneous judgment is as conclusive as a correct one.' " ' " (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 407.) A judgment includes a final order as well. (§ 1908, subd. (a).)

The relief sought in 2006 was the imposition of monetary sanctions on the Elmers, rather than the equitable relief sought in the first two causes of the cross-complaint. Nonetheless, it was argued in 2006 that the Elmers' were subject to the 2003 judgment's "approval or removal" requirements regarding the outbuildings and pump house on the property. To resolve this issue, the court ruled on the applicability of the 2003 judgment generally against the Elmers, and determined the Elmers were not bound by it, including because that judgment did not determine the rights of the parties regarding the restrictions, but simply ruled regarding previous judgments and orders (and also found the previous judgment against Martin was personal to him). Thus, the court ruled with regard to the same rights and obligations that respondents seek to litigate in the present action, i.e., whether or not the 2003 judgment applied to the Elmers, and found that it did not. Respondents are barred from relitigating this issue now under the doctrine of collateral estoppel.

Therefore, we reject respondents' "2003 judgment" argument. In light of our conclusion, we do not discuss the parties' additional arguments regarding that judgment.

DISPOSITION

The court's order partially granting respondents' motion for a new trial is reversed, and this matter remanded with instructions to the trial court to enter judgment in the Elmers' favor regarding respondents' first two causes of action of their cross-complaint in accordance with this opinion.

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Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.